RIVIERA PROMOTIONS SDN BHD

v.

GENTING PERKASA SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
AZAHAR MOHAMED JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: W-02-1077-2010]
4 SEPTEMBER 2012

CIVIL PROCEDURE: *Damages - Assessment of damages - Appeal against - Plaintiff awarded nominal damages of RM10 in lieu of specific performance - Whether award represented substitution for specific performance - Whether plaintiff entitled to substantial damages - Whether there was binding and enforceable agreement between plaintiff and defendants - Whether damages awarded should be based on difference in value of property or loss of profit*

This was an appeal by Riviera Promotions Sdn Bhd ('the plaintiff') against the decision of the High Court Judge in upholding the award of the Deputy Registrar of nominal charges of RM10 to the plaintiff after assessment of damages. Briefly, the sixth defendant was the registered proprietor of a property ('the property') for which approvals for a proposed development project had already been obtained. The first to the fifth defendants, who were the registered and beneficial shareholders of the entire paid up capital of the sixth defendant, had at all material times, evinced an intention to dispose of the property. The plaintiff was designated as the proposed buyer. Arising from negotiations, a formal sale and purchase agreement ('the SPA') was drawn up. Under the SPA, the plaintiff's obligations were, *inter alia*, to pay a sum of RM4,535,000 as the purchase price. At the time appointed for execution, the plaintiff and the second, third and fifth defendants signed the SPA. However, the first and the fourth defendants refused to sign it. Further, the sixth defendant had transferred the property to Diamond Paradise Sdn Bhd for a purchase consideration of RM8.5 million. The plaintiff through its solicitors demanded for all the defendants to execute the SPA. The defendants' solicitors however gave notice that the defendants did not wish to proceed with the transaction embodied under the

SPA. Subsequently, the plaintiff filed an action against the defendants for specific performance or damages *in lieu* of specific performance. On 15 April 2003, after a summary trial under O. 33 of the Rules of the High Court 1980, the High Court decided in favour of the plaintiff and held that the defendants pay the plaintiff damages *in lieu* of specific performance to be assessed before the Deputy Registrar and that the defendants pay the plaintiff the costs of this action. Subsequently, after assessment of damages, the Deputy Registrar awarded nominal damages of the sum of RM10 to the plaintiff. The plaintiff's appeal against the Deputy Registrar's said award was dismissed by the judge in chambers. Hence, this appeal.

Held (allowing the appeal with costs)
Per Azahar Mohamed JCA delivering the judgment of the court:

(1) The learned judge had erred when it failed to consider or appreciate that the order dated 15 April 2003 determined with finality that there was a binding and enforceable agreement between the plaintiff and the defendants. The said order stood unimpeached. There was no appeal against the order. The learned judge fell into serious error when she held that there was no concluded contract; which conclusion destroyed the substratum of her decision, and proceeded to award the plaintiff nominal damages of RM10 as opposed to substantial damages which the plaintiff was clearly entitled to. The award of RM10 could not credibly represent as a substitution for specific performance. (para 10)

(2) Damages *in lieu* of specific performance are damages that would substitute the relief of specific performance. It is damages in equity. It is intended to place the plaintiff in the same position it would have been had the defendants not breached the SPA by refusing to execute and thereafter perform the same. It is damages that represent the potentiality or the value of the property if the court had ordered specific performance. (para 11)

(3) This court being a court of review, can interfere with the decision of the High Court or the exercise by it of its discretion where there has been a serious misdirection by the learned judge that had resulted in a failure of justice. In the case of an assessment of damages, application of wrong

principles and an erroneous estimate of damages justified appellate intervention. An appellate court on the issue of assessment of damages is in as good a position as the High Court to evaluate the evidence particularly since the evidence adduced before the Deputy Registrar and the learned judge was not by way of *viva voce* evidence but by affidavit. (para 12)

(4) Applying the adverse inference doctrine and on the basis of the factual matrix and the circumstances prevailing in the present case, there was a difference in the value of the property and this difference represented the loss suffered by the plaintiff arising from the refusal of the defendants to complete the SPA between the plaintiff and the defendants. From the memorandum of transfer, the defendants had disposed of the property on 26 September 1997. The sale price was 8.5 million. The value of the property was clearly in the region of RM8.5 - 9.0 million. The plaintiff's purchase price under the SPA agreement was RM4.535 million. The defendants had disposed the subject land for a profit of at least RM3.9 million. Thus, this court made the order that the defendants pay the sum of RM3.9 million to the plaintiff by way of general damages. (paras 15 & 16)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan Riviera Promotions Sdn Bhd ('plaintif') terhadap keputusan Hakim Mahkamah Tinggi dalam mengekalkan award Timbalan Pendaftar yang memberi caj nominal RM10 kepada plaintif selepas taksiran ganti rugi. Secara ringkas, defendan keenam adalah pemilik berdaftar hartanah ('hartanah') yang telah diberikan kelulusan bagi cadangan projek pembangunan. Defendan pertama hingga defendan kelima, yang merupakan pemegang-pemegang saham berdaftar dan berfaedah bagi keseluruhan modal yang sudah dibayar defendan keenam, telah pada setiap masa yang material, menunjukkan niat untuk melupuskan hartanah tersebut. Plaintif telah ditetapkan sebagai pembeli yang dicadangkan. Melalui perundingan, satu perjanjian jual beli rasmi ('PJB') telah disediakan. Di bawah PJB, tanggungjawab plaintif adalah, antara lain, membayar amaun RM4,535,000 sebagai harga belian. Pada masa yang ditetapkan bagi pelaksanaan, plaintif dan defendan kedua, ketiga dan juga kelima telah menandatangani PJB. Walau

bagaimanapun, defendan kedua dan keempat enggan menandatanganinya. Seterusnya, defendan keenam telah memindahkan hartanah kepada Diamond Paradise Sdn Bhd untuk pertimbangan pembelian RM8.5 juta. Plaintif melalui peguamcaranya menuntut supaya kesemua defendan melaksanakan PJB. Sebaliknya peguamcara pihak defendan telah memberikan notis bahawa defendan-defendan tidak ingin meneruskan dengan transaksi yang termaktub di bawah PJB. Plaintif kemudiannya memfailkan tindakan terhadap defendan-defendan bagi pelaksanaan spesifik atau ganti rugi sebagai penggantian pelaksanaan spesifik. Pada 15 April 2003, selepas perbicaraan terus di bawah A. 33 Kaedah-Kaedah Mahkamah Tinggi 1980, Mahkamah Tinggi telah membuat keputusan bagi pihak plaintif dan memutuskan bahawa defendan-defendan harus membayar plaintif ganti rugi sebagai penggantian pelaksanaan spesifik untuk ditaksirkan di hadapan Timbalan Pendaftar dan defendan-defendan juga harus membayar plaintif bagi kos tindakan ini. Kemudiannya, selepas taksiran ganti rugi dibuat, Timbalan Pendaftar telah mengawardkan ganti rugi nominal amaun RM10 dibayar kepada plaintif. Rayuan plaintif terhadap award Timbalan Pendaftar telah ditolak oleh hakim dalam kamar. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah khilaf apabila ia gagal mempertimbangkan atau menyedari bahawa perintah bertarikh 15 April 2003 telah menentukan dengan muktamad bahawa terdapat perjanjian yang mengikat dan boleh dikuatkuasakan di antara plaintif dan defendan-defendan. Perintah tersebut tidak dicabar. Tiada rayuan terhadap perintah itu. Yang arif hakim telah melakukan kesalahan yang serius apabila beliau memutuskan bahawa tiada kontrak yang disimpulkan dan terikat; kesimpulan itu telah memusnahkan substratum keputusan beliau, dan telah mengawardkan plaintif ganti rugi nominal RM10 berbanding dengan ganti rugi yang besar yang plaintif dengan jelas berhak memperolehi. Award RM10 tidak dipercayai dapat mewakili penggantian pelaksanaan spesifik.

(2) Ganti rugi sebagai ganti pelaksanaan spesifik adalah ganti rugi yang akan menggantikan relif pelaksanaan spesifik. Ia adalah ganti rugi dalam ekuiti. Ia diniatkan untuk meletakkan plaintif dalam kedudukan ia sepatutnya berada jika pihak defendan

tidak melanggar PJB dengan keengganannya untuk melaksanakannya. Ia adalah ganti rugi yang mewakili potensi atau nilai hartanah jika mahkamah memerintahkan pelaksanaan spesifik..

(3) Mahkamah ini sebagai mahkamah semakan, boleh campur tangan dengan keputusan Mahkamah Tinggi atau pelaksanaan melalui budi bicaranya di mana terdapat salah arah yang serius oleh yang arif hakim yang telah mengakibatkan kegagalan keadilan. Di dalam kes taksiran ganti rugi, pemakaian prinsip-prinsip yang salah dan anggaran ganti rugi yang tidak betul mewajarkan campur tangan rayuan. Mahkamah rayuan yang menangani isu taksiran ganti rugi berada di kedudukan yang sama seperti Mahkmah Tinggi untuk menilai keterangan terutamanya apabila keterangan yang dikemukakan di hadapan Timbalan Pendaftar dan yang arif hakim bukan melalui keterangan *viva voce* tetapi melalui afidavit.

(4) Menggunapakai doktrin inferens bertentangan dan berdasarkan matriks fakta serta keadaan-keadaan yang wujud di dalam kes ini, terdapat perbezaan di dalam nilai hartanah dan perbezaan ini menggambarkan kerugian yang dialami oleh plaintif akibat keengganan defendan-defendan menyelesaikan PJB di antara plaintif dan defendan-defendan. Dari memorandum pindah milik, defendan-defendan telah melupuskan harta pada 26 September 1997. Harga jualan adalah 8.5 juta. Nilai hartanah jelasnya dalam lingkungan RM8.5 - 9.0 juta. Harga belian plaintif di bawah PJB adalah RM4.535 juta. Defendan-defendan telah melupuskan hartanah tertakluk itu untuk keuntungan sekurang-kurangnya RM3.9 juta. Oleh itu, mahkamah ini telah membuat perintah bahawa defendan-defendan membayar amaun RM3.9 juta kepada plaintif melalui gantirugi am.

Case(s) referred to:

Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors & Another Appeal [1998] 3 CLJ 169 CA ***(refd)***

Hickey v. Bruhns [1977] 2 NZLR 71 ***(refd)***

Johnson v. Agnew [1980] AC 367 ***(refd)***

President, District Council, Batu Pahat v. Lo Hong Tan & Ors [1983] 1 CLJ 175; [1983] CLJ (Rep) 331 FC ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

Wroth v. Tyler [1974] AC 30 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 33

For the appellant - Saranjit Singh (Nur Yasmin Osman with him); M/s Saranjit Singh & Co
For the respondents - Lee Min Choon; M/s Hazidin Chan

[Editor's note: For the High Court judgment, please see Riviera Promotions Sdn Bhd v. Genting Perkasa Sdn Bhd & Ors [2010] 1 LNS 297.]

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed JCA:

[1] This is an appeal by Riviera Promotions Sdn Bhd (the plaintiff in the High Court) against the decision of the learned judge of the Kuala Lumpur High Court upholding the award of the Deputy Registrar of nominal damages of RM10 to the plaintiff after assessment of damages.

[2] For convenience and ease of reference, in this judgment parties shall be referred to in their capacities as in the court below.

[3] Without going into details, the undisputed factual background and the sequence of events leading to this appeal are as follows. The 6th defendant was the registered proprietor of Geran 32397 Lot No. 841, Section 4, Town of Butterworth, Penang measuring in area 97,738 square feet for which approvals for a proposed development project for an 18-storey commercial complex consisting of commercial, shop and office lots (the property) had already been obtained. The 1st to the 5th defendants were at all material times the registered and beneficial shareholders of the entire paid up capital of the 6th defendant. The property was at that time charged to Southern Bank Berhad and the redemption sum was RM5,000,000.

[4] The 1st to the 5th defendants, at all material times, evinced an intention to dispose of the property. The plaintiff was designated as the proposed buyer. Thereafter the plaintiff entered into negotiations, in association with its solicitors, with the 1st to

the 5th defendants in association with their solicitors. Arising from the negotiations, the plaintiff and the 1st to the 5th defendants entered into an agreement dated 28 March 1997 titled "Memorandum of Understanding" (the said memorandum). Following from the execution of the said memorandum, the parties had several meetings and there were a series of letters starting from the letter dated 7 April 1997 and ending with the letter dated 28 April 1997, which were in the nature of negotiations to settle the terms and conditions of an agreement proposed to be entered into between the plaintiff and the defendants, culminating in a formal Sale and Purchase Agreement (the SPA) being drawn up. Under the SPA, the plaintiff's obligations were, *inter alia*, to pay a sum of RM4,535,000 as the purchase price which would have been satisfied by the 11 contra units worth RM4,574,000 and to assume the existing loan of RM5,000,000.

[5] Then an important event happened, which turned out to be of critical consequence in the dispute between the parties herein. At the time appointed for execution, the plaintiff and the 2nd, 3rd and 5th defendants signed the SPA. However, the 1st and the 4th defendants refused to sign it. What's more, it is undisputed that on 26 September 1997, the 6th defendant transferred the property to Diamond Paradise Sdn Bhd for a purchase consideration of RM8.5 million.

[6] By a letter dated 6 August 1997, the plaintiff through its solicitors demanded all the defendants to execute the SPA. Next, by a letter dated 8 August 1997, the defendants' solicitors gave notice that the defendants did not wish to proceed with the transaction embodied under the SPA. Subsequently, the plaintiff filed an action against all the six defendants for specific performance or damages *in lieu* of specific performance. Later on pursuant to a consent order dated 11 August 2000, it was agreed by both the parties that the following question be tried as preliminary issue under O. 33 of the Rules of the High Court 1980 in this action before trial: whether the exchange of correspondence and letters between the plaintiff's solicitors and the defendants' solicitors culminated in a binding and enforceable SPA that was executed by the plaintiff and the 2nd, 3rd and 5th defendants but not by the 1st and 4th defendants.

[7] Then, on 15 April 2003, after a summary trial under O. 33, the High Court decided the preliminary issue in favour of the plaintiff and that the defendants pay the plaintiff 'damages *in lieu* of specific performance to be assessed before the Deputy Registrar and that the defendants do pay the plaintiff the costs of this action'.

[8] Subsequently, on 26 February 2008, after assessment of damages, the deputy registrar awarded nominal damages of the sum of RM10 to the plaintiff. The plaintiff appealed to the judge in chambers. On 12 March 2010, the learned judge dismissed the plaintiff's appeal against the deputy registrar's award of nominal damages. As indicated earlier, the plaintiff being dissatisfied with the decision of the learned judge appealed to this court.

[9] In considering this appeal, we have closely scrutinised the judgment of the learned judge. A reading of the judgment reveals that the learned judge had premised her judgment that there was no binding and enforceable agreement between the plaintiff and the defendants. The learned judge had ventured into reviewing an earlier order and judgment by the High Court that ordered damages to be assessed *in lieu* of specific performance. The problem with this judgment is that it does not accord with the order dated 15 April 2003, which we have alluded to earlier.

[10] In our judgment, the learned judge had erroneously ventured into reviewing an earlier order and judgment by the High Court that ordered damages to be assessed *in lieu* of specific performance. The learned judge failed to consider or appreciate that the order dated 15 April 2003 determined with finality that there was a binding and enforceable agreement between the plaintiff and the defendants. We cannot stress too much the point that by consent order dated 11 August 2000, the preliminary issue to be determined was whether there was a binding and enforceable agreement between the parties. It should be borne in mind that the order dated 11 August 2000 was referred to in the order dated 15 April 2003, which ruled the preliminary issue in favour of the plaintiff, that is to say that there was a binding and enforceable agreement between the plaintiff and the defendants. As a matter of fact, the order dated 15 April 2003 stands unimpeached. There was no appeal against the order. The learned judge had for that reason arrived at an erroneous factual

impression that there was no binding or enforceable agreement between the parties. In consequence thereof, the learned judge had erred in determining the plaintiff's entitlement to damages *in lieu* of specific performance to be based on the existence of a contract. The learned judge fell into serious error when she held that there was no concluded contract, which conclusion destroyed the substratum of her decision, and proceeded to award the plaintiff nominal damages RM10 as opposed to substantial damages which the plaintiff was clearly entitled to. The award of RM10 cannot credibly represent as a substitution for specific performance. This is particularly so when the defendants had in 1997 itself disposed of the property for RM8.5 million, RM3.9 million more than the purchase consideration payable by the plaintiff under the SPA.

[11] Damages *in lieu* of specific performance are damages that would substitute the relief of specific performance. It is damages in equity. It is intended to place the plaintiff in the same position it would have been had the defendants not breached the SPA by refusing to execute and thereafter perform the same. It is damages that represent the potentiality or the value of the property if the court had ordered specific performance (see: *Wroth v. Tyler* [1974] AC 30, *Johnson v. Agnew* [1980] AC 367, *Hickey v. Bruhns* [1977] 2 NZLR 71, *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15).

[12] Coming back then to the present case, once it is acknowledged that there was an existing contract, then the only issue before the learned judge was whether the damages to be awarded to the plaintiff was to be based on the difference in the value of the property or the loss of profit. In this regard, this court being a court of review can interfere with the decision of the High Court or the exercise by it of its discretion where there has been a serious misdirection by the learned judge that had resulted in a failure of justice. In the case of an assessment of damages, application of wrong principles and an erroneous estimate of damages justifies appellate intervention (see: *Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors & Another Appeal* [1998] 3 CLJ 169 and *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15). An appellate court on the issue of assessment of damages is in as good a position as the High Court to evaluate the evidence

particularly since the evidence adduced before the deputy registrar and the learned judge was not by way of *viva voce* evidence but by affidavit. We are entitled to consider such evidence and make our own conclusions (see: *President, District Council, Batu Pahat v. Lo Hong Tan & Ors* [1983] 1 CLJ 175; [1983] CLJ (Rep) 331).

[13] In our considered view, this is a case where general damages should have been assessed by way of the difference in the value of the property in the light of conflicting expert evidence as regards loss of profit. As regards the differences in value, this evidence was readily available as the respondents sold the property shortly after refusing to complete the sale and purchase agreement. This is not a disputed fact.

[14] The plaintiff's submission is that there is evidence that demonstrates that the subsequent sale by the defendants also included the assumption of the debt by the subsequent purchaser. The plaintiff was unable to prove this because the defendants refused to produce the second sale and purchase agreement. However, there is evidence that the outstanding charge on the said property continue to subsist after the completion of the second sale and purchase agreement. The defendants' contention is that they sold the property at a loss. In our judgment, apart from the existence of the charge being sufficient evidence that the second sale included the debt, it must be borne in mind that the burden of proving the loss vested with the defendants and this burden they failed to discharge on the balance of probability.

[15] Accordingly, applying the adverse inference doctrine and on the basis of the factual matrix and the circumstances prevailing in the present case, we are satisfied that there was a difference in the value of the property and this difference represents the loss suffered by the plaintiff arising from the refusal of the defendants to complete the SPA between the plaintiff and the defendants. As can be seen from Memorandum of Transfer (p. 729 vol. 9 of appeal record), the defendants disposed of the property on 26 September 1997. The sale price was RM8.5 million. The value of the property is clearly in the region of RM8.5 - RM9.0 million judging by the stamp duty paid, ie, RM314,000. The plaintiff's purchase price under the SPA agreement was RM4.535 million. The defendants disposed the subject land for a profit of at least RM3.9 million.

[16] We therefore allow the appeal with costs of RM30,000 here and below and we set aside the decision of the learned judge. We now make an order that the defendants to pay the sum of RM3.9 million to the plaintiff by way of general damages. Deposit is refunded to the plaintiff.